

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

January 3, 2007

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Re: C&J Paving, Inc. v. Hickory Commons, LLC
C.A.No. 06L-07-023 THG

Date Submitted: October 6, 2006

Dear Counsel:

Pending before the Court is Defendant's Motion to Dismiss. For the reasons stated herein, the motion is granted as to Plaintiff's mechanic's lien claim. Plaintiff's unjust enrichment claim withstands the motion.

Statement of the Case

On July 21, 2006, C & J Paving, Inc. ("Plaintiff") brought this action for the entry of a mechanic's lien on certain real property owned by Hickory Commons, LLC ("Hickory Commons" or "Defendant"). The subject of the Complaint is the labor and materials provided by Plaintiff to Fresh Cut Design Landscaping, Inc. ("Fresh Cut")¹ for the excavation and paving of part of the common areas of a development in or near Millsboro, Sussex County, Delaware, known as The Commons at Radish Farm. Defendant filed a timely Motion to Dismiss the Complaint pursuant to Superior Court Civil Rule 12(b)(6) and Superior Court Civil Rule 12(b)(7).

¹ Plaintiff also served a copy of the complaint upon Fresh Cut for notice purposes only due to the fact that Fresh Cut is currently in the process of declaring bankruptcy and is under the protection of the United States Bankruptcy Code.

Statement of the Facts

Fresh Cut is a subcontractor for Madarin Homes, the general contractor retained by Hickory Commons to manage the development of The Commons at Radish Farm. Plaintiff contracted with Fresh Cut to provide the paving and excavation for the paving and curbing of several of the subdivision's streets. It is evident from the Complaint that the improvements made were limited to the paving and curbing of two streets, Maidstone Court and Tunbridge Court. Plaintiff's Complaint does not allege the existence of any house, building or other structure serviced by these streets.

Defendant argues that the statement of claim for a mechanic's lien fails to comply with the technical requirements of Chapter 27 of Title 25 of the Delaware Code in at least three respects: (1) Plaintiff has failed to allege the existence of a contract between it and the land owner; (2) Plaintiff has failed to allege any particular structure benefitted by the labor and materials provided; and (3) Plaintiff has failed to apportion the claim as required when multiple structures are benefitted by the labor and materials at issue. Defendant also argues that Plaintiff's mechanic's lien claim must fail because Plaintiff has failed to join necessary parties to the action. Because the Court finds Plaintiff's failure to allege the existence of a contract between it and Hickory Commons is fatal to the mechanic's lien action, Defendant's Motion to Dismiss is granted as to that count.

Discussion

Standard of Review

It is well settled under Delaware law that a complaint will not be dismissed for failure to state a claim unless it appears reasonably certain "that a plaintiff would not be entitled to the relief sought under any set of facts which could be proven to support the action." *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998); *Rabkin v. Philip A. Hunt Chem. Corp.*, 498 A.2d 1099, 1104 (Del. 1985).

In considering the sufficiency of the complaint, all well-pleaded allegations are accepted as true, and all reasonable inferences are construed in favor of the plaintiff. *Havens v. Attar*, 1997 WL 55957, at *5 (Del. Ch. Jan. 30, 1997). “A complaint[,] attacked by a motion to dismiss for failure to state a claim[,] will not be dismissed unless it is clearly without merit, which may be either a matter of law or of fact.” *Diamond State Tel. Co. v. University of Delaware*, 269 A.2d 52, 58 (Del. 1978). In sum, the test for sufficiency is a broad one. It is measured by whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint. *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978); *Klein v. Sunbeam Corp.*, 94 A.2d 385, 391 (Del. 1952). If the plaintiff may recover, the motion must be denied.

Merits

Defendant argues that the work for which Plaintiff seeks a mechanic’s lien consisted of improvements to the land, alone, and, consequently, the absence of a signed contract by the land owner, Hickory Commons, is fatal to Plaintiff’s action. Defendant also submits that Plaintiff has failed to apportion the claim in violation of statute and that Plaintiff has failed to join all necessary parties. Plaintiff asserts, in response to Defendant’s motion, that the property to which improvements were made is designated as common area on plot maps recorded with the Sussex County Recorder of Deeds. Moreover, Plaintiff posits that the community center for the development is serviced by the streets paved by Plaintiff and that some other, as yet unknown, structures may be built in the common elements. Finally, Plaintiff submits that the common elements that benefitted from Plaintiff’s labor and materials remain in Defendant’s possession as one “unit” at this time.

The right to a mechanic’s lien is a creation of statute and “being in derogation of the common law, it must be strictly construed....” *Department of Cmty. Affairs & Econ. Dev. v. M. Davis*

& Sons, Inc., 412 A.2d 939, 942 (Del. 1980). “Strict compliance with the statute is required as powerful relief is afforded that was unavailable at common law.” *J.O.B. Constr. Co. v. Jennings & Churella Servs., Inc.*, 2001 WL 985106, at *2 (Del. Super. Aug. 9, 2001). Section 2702(a) provides that anyone who has provided labor and/or material to the erection, alteration or repair of any structure may seek a mechanic’s lien for nonpayment. Section 2702(b) lists various types of work for which liens may be obtained; one of these types of work is listed as “paving”. Section 2703 of Title 25 of the Delaware Code prohibits a lien from attaching where improvements are made to the land alone unless a contract is signed by the land owner. This statute reads, in relevant part:

No lien shall attach in case the improvements are to the land alone, unless a contract in writing, signed by the owner or owners thereof, setting forth the names of all the parties to the contract and containing a description by the metes and bounds of the land to be affected and by a statement of the general character of the work to be done, and of the total amount to be paid thereunder, and the amounts of the partial payments together with the time when such payments shall be due and payable.

25 Del. C. § 2703.

Delaware case law requires paving be appurtenant to an existing structure if a plaintiff wishes to bypass the requirements of Section 2703. *See Pioneer National Title Insurance Co. v. Exten Associates, Inc.*, 403 A.2d 283, 286 (Del. 1979) (distinguishing components of permanently situated or erected houses and buildings from improvements to land which may be made before, after or during the construction of the “structure” for which the land is to be used). In the present case, Plaintiff does not plead the existence of a structure which is immediately serviced by the paving Plaintiff provided. Moreover, Plaintiff does not plead the paving of any driveway or even of a parking lot adjacent to an existing structure. Indeed, if this is not a case of improvements to land alone, the Court is hard pressed to conceive of a situation that would fall under Section 2703. The

Court concludes Plaintiff must meet the requirements embodied in Section 2703 to sustain its mechanic's lien claim under the circumstances. Plaintiff has failed to do so by its failure to present a contract signed by Defendant for the work performed; accordingly, its mechanic's lien claim must be dismissed.

Although scant attention was paid by the parties to Plaintiff's unjust enrichment claim in the briefing of this motion, presumably Defendant extends its failure to join necessary parties' argument to this claim. The Court is unpersuaded, however, that an unjust enrichment claim may not be pursued by Plaintiff against the current owner of the common areas of the subdivision. Plaintiff represents to the Court that the common elements have not yet been conveyed to a homeowners' association and remain in the possession of Defendant as one unit. For the time being, that uncontested representation is sufficient to defend against a motion to dismiss the unjust enrichment claim.

Conclusion

Assuming as true all well-pleaded allegations contained in the Complaint, the Court concludes the work that forms the basis for this action consisted of improvements made to land alone. Accordingly, the mechanic's lien claim is dismissed for failure to allege the existence of a contract between Plaintiff and Defendant. Plaintiff's unjust enrichment claim survives Defendant's motion.

Yours very truly,

T. Henley Graves

cc: Prothonotary